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(3)

No. 95-372

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

NORMAN W. SWANSON, *et al.*,

Petitioners,

V.

JANICE H. FAULKNER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' Brief in Opposition[1] to Petitioners' Petition for a Writ of *Certiorari* misstates the issue presented and misstates numerous facts. Accordingly, having failed to address the actual substance of Petitioners' Petition for a Writ of *Certiorari*, Respondents likewise fail to state any reason why the writ should not issue in this case.

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[1] Cited throughout as "Opp. Br. at ____."

1. Respondents have failed to address the issue presented by Petitioners' Petition for Writ of *Certiorari*. Respondents state that the "nub of Petitioner's argument is that the federal district court's jurisdictional finding in 1990... was a final ruling that was required to be given preclusive effect thereafter." (Opp. Br. at 6.) Respondents are incorrect. The "nub" of Petitioners' argument is that having found the state law remedy inadequate in 1990, the district court below was authorized by *Felder v. Casey*, 487 U.S. 131 (1988) to determine the merits of Petitioners' Section 1983 claims even if a state appellate court subsequently ignored the district court's findings, found the state law remedy adequate and dismissed Petitioners' claims in the state court action based upon procedural hurdles contained within the state law remedy. Petitioners further contend that having found the state law remedy inadequate as a matter of "fact" in addressing its jurisdiction, the district court in this case was not precluded by this Court's decision in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986) from deciding the remaining issues in the case based upon its own earlier determination even though a state appellate court subsequently issued an inconsistent ruling and dismissed Petitioners' claims in the state court action for lack of jurisdiction.

In their Petition for Writ of *Certiorari*, Petitioners explained why these contentions and the ruling of the circuit court below present this Court with an opportunity to reconcile this Court's decision in *Parsons Steel* with the federal interest in providing a forum for vindication of federal constitutional rights in the face of inadequate state law remedies as described in *Felder* and as implied in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S.Ct. 2351 (1995). Further, Petitioners explained that review here is necessary to address the authority of a federal district court (properly assuming

jurisdiction because of the inadequacy of the state law remedy) to address the merits of Petitioners' claims of discriminatory taxation and to use 42 U.S.C. § 1983 to enforce this Court's mandates in *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993) and *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

Respondents' Brief in Opposition does not address whether these are important issues worthy of consideration by this Court. Instead, Respondents set up a "straw man" issue (whether Petitioners can relitigate in this Court the preclusive effect of the district court's 1990 findings on the North Carolina Supreme Court), ignore the fact that Petitioners are not trying to relitigate this issue which they lost in the state court, and then proceed to apply *Parsons Steel* to this phantom issue. Having done so, Respondents fail to provide this Court with any reason as to why certiorari should not be granted on the issues which Petitioners actually seek to present.

2. *Parsons Steel* does not control the issues presented here. Respondent's assertion that *Parsons Steel* is indistinguishable from this case is also predicated on their misapprehension of the issue presented. *Parsons Steel* held that the relitigation exception to the Anti-Injunction Act could not be used by a federal court to enforce its orders when the preclusive effect of those orders had already been litigated in state court. In *Parsons Steel*, the Court based its holding on the well established rule that once the preclusive effect of a court's decision has been determined in a later proceeding by another court (whether the subsequent court is a federal or a state court), that decision is binding in all subsequent cases unless and until reversed on appeal. *Parsons Steel*, 474 U.S. 19; *see Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.* 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

The Court in *Parsons Steel* did not, as Respondents contend, hold that a federal court, after conducting its own inquiry and making findings of facts and conclusions of law, must abandon those determinations when presented with a subsequent state court ruling. *Cf. Freeman United Coal Mining Co. v. OWCP*, 20 F.3d 289 (7th Cir. 1994) (federal administrative law judge need not set aside his earlier disability determination when subsequent state industrial commission disability decision differs); *Howell v. Thomas*, 566 F.2d 469 (5th Cir.) (*per curiam*) *cert. denied*, 439 U.S. 826 (1978) (subsequent state bar proceeding does not preclude federal court from enforcing earlier contempt order).

The *Parsons Steel* Court did not address at all the preclusive effect of subsequent judicial decisions on earlier orders in pending federal matters. In contrast, the Sixth Circuit in *American Postal Workers Union v. United States Postal Service*, 736 F.2d 317 (6th Cir. 1984) and the Fifth Circuit in *Cycles, Ltd. v. Navistar Financial Corp.*, 37 F.3d 1088 (5th Cir. 1994) addressed the effect of such subsequent decisions and each held that the preclusive effect of subsequent orders does not extend to prior decisions.

In *American Postal Workers Union*, the Sixth Circuit expressly acknowledged and distinguished the rule of *Migra*, *Kremer*, and *Allen* relied upon by this Court in *Parsons Steel*. *American Postal Workers Union*, 736 F.2d at 319; *see also* supra, at 3. The rule is that courts in subsequent cases are to give preclusive effect to the most recent decision even if that decision erroneously failed to give preclusive effect to an earlier decision. The distinction made in *American Postal Workers Union* is that this rule does not apply to the earlier decision itself or subsequent proceedings based upon the earlier decision undertaken in the very case in which the earlier decision was rendered. *Id.* Neither *American Postal Workers*

Union, Cycles Ltd., Parsons Steel, Kremer, Migra nor *Allen* make any distinction in the application of the general rule or the *American Postal Workers Union* exception based upon whether the subsequent decision was rendered by a state or federal court decision. Neither Respondents nor the Fourth Circuit in its opinion below articulated any basis for a different rule when the subsequent decision is a state court decision. In fact, both Respondents and the Fourth Circuit failed to acknowledge the *American Postal Workers Union* exception to the general rule, failed to address the rationale for this exception, and failed to recognize that *Parsons Steel* simply does not address the situation at hand and did not undermine the rationale of the *American Postal Workers Union* exception.

Because *Parsons Steel* only addressed the limits on federal court interference with state court enforcement of and reliance upon their own decisions and did not address the extent to which federal courts should allow subsequent state court decisions to interfere with federal court enforcement of and reliance upon their own earlier federal decisions, *Parsons Steel* is inapposite. Likewise, Respondents' attempt to distinguish the plethora of case law cited in Petitioners' brief is unavailing.[2] Moreover, the expansive interpretation of *Parsons Steel* by the Fourth Circuit conflicts with decisions from the Fifth, Sixth, Seventh and Ninth Circuits and dicta from the Third Circuit. Petition at 9-14. Accordingly, review by this Court is necessary to resolve the conflict among the circuits, to address the

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[2] Respondents are justifiably mystified by Petitioners citation of *Clark Equipment Co. v. United States*, 912 F.2d 113 (6th Cir. 1990), *cert. denied*, 500 U.S. 941 (1991). (See Opp. Br. at 13.) *Clark Equipment Co.* was cited in error. The intended citation was to *American Town Center v. Hall 83 Associates*, 912 F.2d 104 (6th Cir. 1990) which ends on the same page as the decision in *Clark Equipment Co.* begins. *American Town Center* is offered as general background on how *Parsons Steel* has been applied by the Sixth Circuit.

American Postal Workers Union exception, and to clarify the sweep of *Parsons Steel*.

3. Respondents Counter Statement of the Facts seeks to create the misimpression that state law afforded Petitioners adequate relief. All of the pertinent facts recited by Respondents were addressed by the district court order of August 6, 1990. The findings and conclusions in that order paint a very different picture from Respondents' selective rendition in their Brief in Opposition to this Court. (App. D, pp. 29-37.) Because the district court's order remains unmodified and unreversed on appeal, the factual view expressed in that order of a hopelessly muddled, inadequate and uncertain state law remedial scheme controls here and inconsistent statements by Respondents must be rejected.

For example, Respondents state that "all federal pensioners received either a refund or a tax credit for state taxes paid on their 1988 federal pension income". (Opp. Br. at 3.) This is not true. Dead federal pensioners and federal pensioners with no, or insufficient, taxable income during 1990-1992 could not take advantage of a tax credit to produce a tax scheme which as to them was "in hindsight nondiscriminatory". (App. D, p. 36.) Additionally, certain federal retirees complied with the state law refund requirements and still received no refunds (at least, not until it became strategically advantageous for Respondents to attempt to destroy their standing as Class representatives and even then not all of them received refunds). (App. A, pp. 13-14; *Homesley v. Faulkner*, No. 95-373, App. H, pp. 93-110 (hereinafter "*Homesley* Petition, App. ___, p. ____").) The exact number of taxpayers who were disadvantaged by Respondents' less than meaningful approach to backward-looking relief, of course, has not been determined since Petitioners' state court action was dismissed on jurisdictional grounds and the district court below dismissed their claims

based upon the state court decision before the extent of North Carolina's discrimination was quantified "in hindsight" by either court. The fact of the discrimination "in hindsight" as to Class A is, nonetheless, abundantly clear despite Respondents' attempt to imply otherwise.

Likewise, the discrimination "in hindsight" against Class B remains. While Respondents try to assert that no discrimination ever existed as to Class B (Opp. Br. at 3), they proceeded on summary judgment below. Therefore, this disputed fact must be taken in the light most favorable to Petitioners, i.e., discrimination existed.[3] Respondents do not and cannot claim that any relief has been provided to Class B.

Respondents further state in effect that Class A is limited to those who failed to comply with N.C. Gen. Stat. § 105-267 and therefore did not receive refunds. (Opp. Br. at 3.) This statement is likewise untrue. Some members of Class A complied and yet did not receive refunds. (App. A, pp. 13-14; *see Homesley* Petition, App. H, pp. 93-110.) A separate petition addressing issues unique to these members of Class A has been filed with the Court. *Homesley v. Faulkner*, No. 95-373.

Finally, Respondents assert that following *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), North Carolina equalized its tax treatment of state and federal pension income. (Opp. Br. at 2.) Petitioners do not dispute that Respondents

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[3] The title to the legislation repealing the tax benefit for North Carolina National Guard members reads: "An Act to Conform the laws of North Carolina to the Requirements of Certain Federal Laws and Constitutional Principles". 1989 N.C. Sess. Laws (Reg. Sess. 1990) Ch. 1002. Thus, despite Respondents' attempts to assert otherwise, the North Carolina legislature has effectively conceded that discrimination did exist.

purported to equalize this tax treatment for tax years after 1988. Whether or not Respondents were successful remains in dispute.[4] Furthermore, the district court below clearly found that Respondents did not equalize this tax treatment for tax years before 1989. (App. D, pp. 35-36.) Again, Respondents have misstated the facts.

In large measure, these factual statements (misstatements actually) are not pertinent to the issue presented. However, they do tend to illustrate how important issues have been left unresolved in this case. Respondents claim that Petitioners merely seek a "second bit at the apple." (Opp. Br. at 15.) This assertion also is not true. Petitioners merely seek their "first bite at the apple" on the merits of their claims that North Carolina discriminated in its taxation of them. The federal court held in 1990 that it had jurisdiction to address this issue. The state appellate court held that the state courts did not have jurisdiction because Petitioners (or at least some of them) did not comply with state law procedural hurdles.

Based upon an state court decision, Petitioners are now out of federal court without the opportunity to have their day in court on the merits of their claims of discrimination even though the discrimination has not been fully corrected and "in hindsight" the discrimination remains.

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[4] Some of the Petitioners here are currently pursuing in a state court action entitled *Patton v. State of North Carolina*, their claims that North Carolina failed to actually equalize its tax treatment of them for tax years 1989 and thereafter. These claims are based upon *Sheehy v. Pub. Employees Retirement Div.*, 864 P.2d 762 (Mont. 1993) and a North Carolina state trial court decision in *Bailey v. State of North Carolina*, 92 CVS 10221 (Sup. Ct. N.C. 1992) (Order of May 21, 1995, as amended by Order of September 21, 1995 holding unconstitutional North Carolina's taxation of state and local government retirement benefits). *See also*, App. D, p. 36 n 4 (legislation enacted after *Davis* treats federal retirees differently than other taxpayers.)

CONCLUSION

It is no wonder that the district court felt "somewhat like a potted plant" in its perceived inability to reach the merits of this case. App. C, p. 25. It would be tragic indeed if a strained interpretation of *Parsons Steel* were to result in a "potted plant" being the metaphor which best describes our federal courts when confronted with a subsequent contrary ruling by a state court.

For Petitioners to ever be heard on the merits of their claims, it is necessary for this court to reconcile *Parsons Steel* with *Felder*, *Harper*, *McKesson*, and to a certain extent *National Private Trucking*. Petitioners urge the Court to do so.

Therefore, and for all of the foregoing reasons, Petitioners respectfully request that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit.

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